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July 2018

# Best Practice Review of Workplace Health and Safety in the Northern Territory

Discussion Paper

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## Foreword

On 5 May 2018, Attorney-General and Minister for Justice, the Honourable Natasha Fyles announced that a best practice review of work health and safety laws is to be undertaken. This follows a similar review that took place in Queensland in 2017.

Under the terms of reference for this best practice review, the reviewer is asked to consider NT WorkSafe's effectiveness in light of contemporary regulatory practice. The scope of the review is to:

1. determine the appropriateness and effectiveness of the current organisational structure, systems and processes in the administration of public safety and compliance.
2. determine the effectiveness of NT WorkSafe's compliance regime and enforcement activities (including inspection, investigations and prosecutions), dispute resolution processes and policy development.
3. determine whether NT WorkSafe has the appropriate balance of regulation of safety (including prosecutions and enforcements) and education and awareness across the Northern Territory.
4. identify any organisational, management, systems or cultural issues that may affect the organisation's ability to operate in a best practice model for safety regulators.
5. identify any capability gaps that may exist with current structural and staffing arrangements.
6. identify any legislative gaps that may exist and proposed remedies.
7. consider specific issues such as whether an offence of 'gross negligence causing death' should be introduced and whether current penalty levels under the current work health and safety laws act as a sufficient deterrent to non-compliance.
8. examine any further measures that can be taken to discourage unsafe work practices, taking into account the national review.
9. provide an opinion on improvements required in the organisation to achieve best practice for a safety regulator both now and into the future, ensuring those suggestions can be funded from and within current resources.

An independent reviewer has been appointed to undertake the best practice review and to consider and report on any potential measures, both operational and legislative, that could be taken to address the matters raised in the terms of reference.

The reviewer will be supported by a tripartite reference group which will provide commentary and advice on the matters to be considered as part of this review. The reference group is comprised of three union representatives, three industry representatives, and two ex-officio government nominees (one from Treasury and one from Education).

The final report to the Attorney in December 2018 will represent the concluded views of the reviewer and not the Reference Group (which is not a voting body).

This discussion paper provides information about NT WorkSafe's policies, procedures and activities that support its approach to ensuring that the *Work Health and Safety (National Uniform Legislation) Act* and the *Work Health and Safety (National Uniform Legislation) Regulations* are communicated, complied with and enforced. It also provides information on the matters raised in the review's terms of reference and provides questions for consideration by stakeholders and interested parties that will assist the reviewer in finalising the review's report and recommendations.

The material in this paper (including the discussion questions) should not be assumed to represent the views of the Government, or the concluded opinions of the reviewer.

## **Review Process**

In addition to meetings of the reference group, the reviewer intends to consult directly with interested groups and relevant Government agencies. A program of field visits with inspectors will also be arranged, both in Darwin and other centres. Written submissions directed to the Terms of Reference and the discussion questions in this paper are sought from interested organisations and individuals.

Submissions to the review should be provided to [andrew.george@nt.gov.au](mailto:andrew.george@nt.gov.au) by 31 August 2018.

Yours sincerely

**Tim Lyons**  
Independent Reviewer

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# TOR 1. The appropriateness and effectiveness of the current organisational structure, systems and processes in the administration of public safety and compliance

## 1.1 Function and Purpose of the Work Health Authority

The role of the Work Health Authority was established by the *Work Health Administration Act*, which came into force on 1 January 2012. The Work Health Authority is granted powers and functions under the *Work Health and Safety (National Uniform Legislation) Act* (the **Act**) and the *Return to Work Act*.

The former Minister for Business was responsible for the *Work Health Administration Act* from July 2016 to 27 August 2016. The Attorney-General and Minister for Justice was responsible for the remainder of the reporting period. The Ministers responsible for the *Work Health Administration Act* are responsible for appointment of the Work Health Authority. Part 2 (5) of the *Work Health Administration Act* provides:

- (1) *The Authority has the following functions:*
  - (a) *to be the regulator under the Work Health and Safety (National Uniform Legislation) Act;*
  - (b) *the functions conferred on it under the Return to Work Act; and*
  - (c) *any other function conferred on it under any Act.*
- (2) *The Authority has the powers necessary to perform its functions.*

The Work Health Authority is also granted powers and functions under the *Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act* and Regulations. Part 2 (22) of the *Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act* provides:

- (1) *The Work Health Authority is the Competent Authority for this act.*
- (2) *The Competent Authority:*
  - (a) *may exercise all the powers and perform all the functions of an authorised officer; and*
  - (b) *when exercising those powers or performing those functions, has all the immunities of an authorised officer.*

## 1.2 NT WorkSafe Corporate Information

Functions of the Work Health Authority are performed by NT WorkSafe, a division of the Department of the Attorney-General and Justice. NT WorkSafe is the statutory body responsible for the Northern Territory-wide provision of advice, information and regulation of workplace health and safety, dangerous goods, electrical safety, and rehabilitation and workers' compensation.

NT WorkSafe comprises the following business units:

- Executive
  - Regulatory Reform
  - Communications
  - Business Administration
  - Training
- Operations
  - Electrical Safety
  - Remote Safety
  - General Safety
- Permissioning and Advisory Services
  - Small Business Safety Program
- Rehabilitation and Compensation

During 2016-17, the Work Health Authority was provided with 62 full-time equivalent staff (FTE) as per the NT WorkSafe organisational chart below. Staff were located at NT WorkSafe offices in Darwin, Katherine and Alice Springs.



NT WorkSafe, as a Division of the Department of Attorney-General & Justice, is responsible for developing and implementing appropriate and effective policy and regulatory responses with respect to workplace health and safety, workers compensation, dangerous goods regulation and electrical safety regulations. The regulatory responses include licensing, monitoring and compliance enforcement. As the administrative arm of the Work Health Authority, NT WorkSafe is also responsible for investigation and prosecution of offences under the legislation administered by NT WorkSafe.

As part of the terms of reference for the review, the reviewer has been asked to consider the appropriateness and effectiveness of NT WorkSafe’s organisational structure, systems and processes in the administration of public safety and compliance. There are three key factors that influence NT WorkSafe’s compliance and enforcement policy. They are:

- the legislative framework which includes the Act and the *Work Health and Safety (National Uniform Legislation) Regulations* (the **Regulations**) and associated regulations, codes of practice and guidance;
- the National Compliance and Enforcement Policy which has been adopted by regulators as part of the national harmonisation process; and
- Australian and Northern Territory work health and safety strategies which include commitments to targets for a reduction in injuries and fatalities as well as the identification of key priority industries and disorders.

The Northern Territory adopted the national model work health and safety laws through the commencement of the Act and the Regulations on 1 January 2012. These model laws have been adopted in all Australian jurisdictions except for Victoria and Western Australia.

The model work health and safety laws are supported by 23 model codes of practice, 19 of which have been adopted in the Northern Territory.

There is a need to continually monitor and review this legislative and policy framework. This is to ensure the Northern Territory’s work health and safety laws, and supporting codes of practice, continue to be responsive to industry needs and safety concerns. This legislative and policy framework must reflect current best practice in safety management. Best practice is driven by the emergence of new health and safety challenges. Lessons may also be learned from sustained poor performance in relation to known hazards and risks. To address these issues, a legislative response is often required to ensure that NT

WorkSafe has the enforcement and compliance tools necessary to improve work health and safety outcomes.

#### **Issues to consider regarding Northern Territory's work health and safety laws**

1. Other than those identified, are there any other elements of the work health and safety legislative framework that should be reviewed to ensure they are effective in improving work health and safety outcomes?

#### **1.3 NT WorkSafe capability (resources, service delivery and training)**

The classifications and formal education requirements contained in the relevant job descriptions of the inspectorate are as follows:

- Senior WorkSafe Inspector (A06) (Tertiary qualification highly desirable / Diploma of Government (Workplace Inspection) desirable);
- Senior WorkSafe Inspector – Electrical (A06) (Tertiary qualification highly desirable / Diploma of Government (Workplace Inspection) desirable / electrical trade qualification essential); and
- Principal WorkSafe Inspector – Team Leader (A07) (Tertiary qualification highly desirable / Diploma of Government (Workplace Inspection) desirable).

#### **Issues to consider regarding NT WorkSafe's capability**

2. What is the appropriate level of skills, qualifications, and ongoing professional development required for inspectors?
3. Are there enough inspectors, and does the current resource allocation within NT WorkSafe strike the right balance between inspectors, management and support functions?
4. Are there any ways in which NT WorkSafe could improve their service delivery?
5. Does the multi-disciplinary and mobile work teams approach operate effectively in different regions and industries?
6. What are measures that can be taken to deal with WHS issues in a large decentralised jurisdiction such as the NT?
7. What are the issues that are specific to remote indigenous communities?

#### **1.4 Inspectorate and Adviser Activity**

NT WorkSafe inspectors and advisors work with industry to ensure health and safety standards are met and sustained, and contribute to NT WorkSafe's compliance activities by:

- responding to work health and safety complaints and incident notifications;
- undertaking workplace assessments;
- providing practical guidance and compliance support to businesses;
- participating in state-wide compliance campaigns; and
- working with industry to seek solutions to work health and safety problems through a variety of programs and interventions.

Visits to workplaces by NT WorkSafe's inspectors and advisors remain a key part of engagement with business and it is only during these visits that an assessment of compliance can be made. Table 1 shows that the number of workplace visits in any given year varies, but on average represents about 6,000 per year. The focus on particular industries depends on the risk profile of that industry and the number of workplaces or worksites that the industry represents. The dominant focus on construction reflects the number of workers employed in this industry, the temporary nature of workplaces and the rapid change in the nature and environment of these workplaces as construction proceeds.



Industry Group	2012/13	2013/14	2014/15	2015/16	2016/17	Total
Accommodation, cafes and restaurants	194	218	241	194	370	1217
Agriculture and fishing	83	89	129	82	85	468
Communications services	13	18	6	20	3	654
Construction	1939	2719	2905	3034	3260	13857
Cultural and recreational services	144	146	158	156	213	817
Education	59	118	111	96	205	589
Electricity, gas and water services	69	62	37	54	61	283
Finance and insurance	1	30	6	10	3	50
Government administration and Defence	172	189	204	193	268	1026
Health and community services	103	147	113	103	134	600
Manufacturing	309	328	274	252	225	1388
Mining	131	169	217	171	92	780
Personal and other services	96	105	126	115	229	671
Property and business services	150	181	199	180	241	951
Retail trade	534	879	807	926	778	3924
Transport and storage	247	222	219	273	125	1086
Wholesale trade	205	176	136	157	107	781
<b>Total</b>	<b>4466</b>	<b>5796</b>	<b>5888</b>	<b>6016</b>	<b>6399</b>	<b>28565</b>

**Table 1 – Number of workplace visits conducted by NT WorkSafe Inspectors**

During these visits, the inspector or advisor may be focussed on particular workplace issues or risks (e.g. falls from height, ergonomic issues, storage and use of chemicals, machinery guarding, UV radiation or asbestos) or they may focus more broadly on the overall work health and safety performance of the workplace and compliance with legislative requirements by the the person conducting a business or undertaking. The location of the workplace, the inspector or advisor’s familiarity with that particular workplace, the complexity of the workplace and the complexity of the issues encountered, all contribute to high variability in the time taken for the inspection and the regulatory tools used to gain work health and safety improvement and regulatory compliance.

Where an inspection or audit reveals that a person conducting a business or undertaking must take action to ensure that they comply with requirements in the legislation, inspectors and advisors can cooperatively secure this compliance through the provision of guidance and advice or, in the case of inspectors, use enforcement powers to ensure compliance. Enforcement by an inspector generally involves issuing an improvement, prohibition or infringement notice. Advisors cannot issue notices but they can seek the support of an inspector to do so.

Seeking voluntary compliance through agreed or negotiated outcomes is a flexible and discretionary way in which inspectors can achieve compliance. These range from an inspector identifying a hazard at a workplace and it being rectified immediately (also known as verbal directions), to a longer term strategy of continuous improvement that is recorded in a safety performance improvement plan which is closely monitored. While at all times during this process the use of enforcement action remains available, it is

only applied by the inspector if the duty holder fails to be co-operative or fails to achieve the identified outcomes within the prescribed timeframes.

**Issues to consider regarding inspectorate and advisor activity**

- |  |
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| <ol style="list-style-type: none"><li>8. How can the work of the inspectorate and advisors be improved?</li><li>9. How can the training, systems and processes used by the inspectorate and advisors be improved?</li><li>10. Does the work of the inspectorate and advisors strike the right balance between being proactive and reactive?</li><li>11. Is the work of the inspectorate and advisors targeting appropriate industries and sectors?</li></ol> |
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**TOR 2. Determine the effectiveness of NT WorkSafe’s compliance regime and enforcement activities (including inspection, investigations and prosecutions), dispute resolution processes and policy development**

In determining the most appropriate enforcement action to undertake, NT WorkSafe are guided by the need to balance the community’s expectations that duty holders will be monitored and held accountable for non-compliance and the need to work with industry to support and build compliance capacity.<sup>1</sup>

NT WorkSafe’s approach to enforcement and compliance is based on the *National Compliance and Enforcement Policy*<sup>2</sup> (National Policy) and seeks to encourage compliance through a responsive regulatory model that combines the deterrence and accommodative regulation into a multifaceted enforcement regime. This approach recognises that regulatory tools such as persuasion and cooperation are just as important to achieving compliance as the imposition of punitive sanctions. This approach is aimed at achieving a balance between the two forms of regulation which acknowledges that the willingness and ability of a duty holder to comply is a key driver in determining the most appropriate enforcement action to be taken in a particular circumstance.

In deciding what the most appropriate regulatory response is, NT WorkSafe are guided by the National Policy and its enforcement pyramid (see Figure 1).

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<sup>1</sup> National Compliance and Enforcement Policy, p2.

<sup>2</sup> <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/national-compliance-enforcement-policy>.



**Figure 1 – National Compliance and Enforcement Policy Pyramid**

The regulatory pyramid represents a proportional approach to the application of enforcement tools and shows that, as a regulator escalates up the pyramid, the regulatory strategy intensifies from persuasion through to sanctions of increasing severity. The premise behind the regulatory pyramid is that where an individual being regulated is being cooperative, the regulator in turn should attempt to achieve compliance through cooperative ‘persuasive’ measures. Conversely, where an individual is being uncooperative the regulator should escalate through the pyramid until punitive sanctions are required thus creating a framework where refusal to comply will result in increasingly severe enforcement action. This approach is not intended to suggest that enforcement and compliance action should always commence with persuasive measures, but rather it acknowledges that more often than not compliance can be achieved through cooperative measures.

Other factors considered by NT WorkSafe in determining the most appropriate enforcement action to undertake include:

- the severity or extent of the potential risk or harm;
- the seriousness of the potential breach and the culpability of the duty holder;
- the duty holder’s compliance history, attitude and the likelihood that the offence will be repeated;
- whether the duty holder was licensed or authorised to undertake the work;
- whether the enforcement tool used will encourage compliance or deter non-compliance;
- whether the duty holder has taken action to try and control a risk and whether the risk is imminent; and
- whether immediate action or a plan to take action will address the safety issue.<sup>3</sup>

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<sup>3</sup> National Compliance and Enforcement Policy, p7.

Other activities undertaken by NT WorkSafe such as compliance campaigns use a combination of directive measures and other mechanisms to achieve outcomes. Sometimes an educative phase is used initially, with the workplace given the information, tools and opportunity to voluntarily address their issues before an inspector visits. In instances where the inspector still finds significant unmanaged risks, notices will be issued. The likelihood of there being outstanding risks however is considered to be lessened. In these cases, it is the combination of the educative phase and the likelihood of a site visit by an inspector which achieves widespread improvements even if an inspector does not select that particular workplace to visit.

### Issues to consider regarding NT WorkSafe’s compliance and enforcement policy

12. Is NT WorkSafe’s compliance and enforcement policy an appropriate approach for monitoring and enforcing compliance with the work health and safety laws?
13. Does NT WorkSafe’s current approach provide an appropriate balance between enforcement and providing industry with the right tools, information and ability to make workplaces safer?

## 2.1 Development of the Australian Work Health and Safety Strategy 2012-2022

The *Australian Work Health and Safety Strategy 2012-2022* (the Australian Strategy) builds on the *National Occupational Health and Safety Strategy 2002–2012* and provides a framework to help improve work health and safety in Australia. The Strategy’s vision is *healthy, safe and productive working lives* and its purpose is to drive key national activities, through collaboration between governments, industry, unions and other organisations, to achieve improvements in work health and safety.<sup>4</sup>

Development of the Australian Strategy was informed by consultation with work health and safety experts and the wider community, and the final strategy was endorsed by all ministers responsible for work health and safety (including Queensland), the Australian Council of Trade Unions, the Australian Chamber of Commerce and Industry, and the Australian Industry Group.

The Australian Strategy sets out four outcomes to be achieved by 2022, these include *reducing the incidence of work-related death, injury and illness; reducing exposure to hazards and risks; improving hazard controls; and improving work health and safety infrastructure*<sup>5</sup>. To achieve these outcomes, the Australian Strategy highlights a number of priority industries and disorders that should be the focal point of prevention activities. It also provides national targets and performance indicators to determine the success of these activities. These targets and priority areas are outlined in Table 1 below.

Targets <sup>6</sup>	Priority industries <sup>7</sup>	Priority disorders <sup>8</sup>
A reduction in the number of worker fatalities due to injury of at least 20 per cent	Agriculture	Musculoskeletal
	Road transport	Mental disorders
	Manufacturing	cancers (including skin cancer)
A reduction in the incidence rate of claims resulting in one or more weeks off work of at least 30 per cent	Construction	asthma
	Accommodation and food services	contact dermatitis
	Public administration and safety	noise-induced hearing loss

<sup>4</sup> *Australian Work Health and Safety Strategy 2012-2022*, p4.

<sup>5</sup> *Australian Work Health and Safety Strategy 2012-2022*, p6.

<sup>6</sup> *Australian Work Health and Safety Strategy 2012-2022*, p7.

<sup>7</sup> *Australian Work Health and Safety Strategy 2012-2022*, p17.

<sup>8</sup> *Australian Work Health and Safety Strategy 2012-2022*, p17.

A reduction in the incidence rate of claims for musculoskeletal disorders resulting in one or more weeks off work of at least 30 per cent.	health care and social assistance	
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**Table 2 – National targets and priority industries/disorders**

Reports on progress against the Australian Strategy are published annually<sup>9</sup> and the strategy is being reviewed in 2017 to ensure it continues to generate sustained improvements in work health and safety.

## 2.2 Partnerships and collaboration

Working with industry, the community and other government departments to develop and implement health and safety strategies is a core pillar in regulatory efforts to build sustainable improvements in work health and safety outcomes. Through collaboration and partnerships, regulators are able to incorporate input and feedback from key stakeholders – an approach that has the ability to translate into a willingness to participate, engage and implement safe work behaviours and initiatives.

### Matters to consider regarding collaboration and partnerships

14. Do you think the use of partnerships and collaboration is an effective enforcement and compliance tool?
15. How should the effectiveness of partnerships and collaboration be measured?
16. Should a collaborative approach be used in any other safety areas or issues? If so, which areas or issues?
17. How should target industries and sectors for partnerships be identified?

## 2.3 Investigations

NT WorkSafe undertake investigations for a number of reasons including to determine the causes of an incident, to assess compliance with work health and safety laws, to determine what action may be needed to prevent further occurrences of similar incidents and to determine what action may be appropriate to enforce compliance with work health and safety laws. Lessons learnt from investigations also inform the development of work health and safety guidance and policy and may inform future changes to work health and safety laws.

### Matters to consider regarding investigations

18. Are there any further actions NT WorkSafe should be undertaking to improve the timeliness and professionalism of investigation processes?
19. How can the training for investigators and systems and processes for investigations be improved?
20. How can the effectiveness of investigation processes be measured?

## 2.4 Prosecutions

Part 13 of the Act provides the framework for NT WorkSafe to undertake prosecutions in relation to alleged breaches of the offence provisions under that Act. Under ss31-33 of the Act, legal proceedings can be commenced against a person or corporation for:

- reckless conduct (category 1 offence);

<sup>9</sup> <http://www.safeworkaustralia.gov.au/sites/swa/australian-strategy/progress/pages/australian-strategy-progress>

- failure to comply with a health and safety duty that exposes an individual to a risk of death or serious injury or illness (category 2 offence); or
- failure to comply with a health and safety duty (category 3 offence).

The decision to prosecute is guided by Northern Territory prosecutorial guidelines and model litigant rules, and the *National Compliance and Enforcement Policy* (National Policy). Broadly, the tests to be met before making a decision to prosecute are:

- the existence of a *prima facie* case, that is, whether the evidence is sufficient to justify the institution of proceedings;
- a reasonable prospect of conviction, that is, an evaluation of the likely strength of the case when it is presented in court; and
- a public interest test, which may include the following considerations:
  - the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature;
  - any mitigating or aggravating circumstances;
  - the characteristics of the duty holder—any special infirmities, prior compliance history and background;
  - the age of the alleged offence;
  - the degree of culpability of the alleged offender;
  - whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute;
  - the efficacy of any alternatives to prosecution;
  - the prevalence of the alleged offence and the need for deterrence, both specific and general; and
  - whether the alleged offence is of considerable public concern.

Description of Activity	2011/12	2012/13	2013/14	2014/15	2015/16	Total
Non-fatal investigations	11	11	19	21	10	
Workplace Death Investigations	5	2	2	1	4	
Total Investigations conducted	16	13	21	22	14	
Total Investigations completed	6	16	13	12	12	
Ongoing Investigations	10	8	7	10	2	
<b>Total</b>						

**Table 3 – Investigations**

Description of Activity	2011/12	2012/13	2013/14	2014/15	2015/16	Total
Prosecutions commenced	5	3	0	1	3	
Investigations not prosecuted	1	13	12	11	9	
Matters with Solicitor for the NT or counsel	6	0	0	0	4	
<b>Total</b>						

**Table 4 – Prosecutions**

## 2.5 Prosecutions since the commencement of the Act in 2012

### **Gibbo's Tyres Pty Ltd – Delivered on 30 April 2018**

On the 19 November 2015 a young child received fatal crush injuries after a truck tyre fell on him as his family waited for a tyre on their vehicle to be replaced at a Katherine business.

On the 19 March 2018 the defendant was convicted and fined \$135,000 for breaching section 32 and \$7,000 for breaching section 38 of the Act. A victims levy of \$2,000 was also imposed.

In the matter of *Stephen Gelding v Gibbo's Tyres Pty Ltd*, the sentencing remarks of His Honour Judge Macdonald in the Local Court at Katherine are available online:

<http://www.worksafe.nt.gov.au/Documents/gibbos-tyres-pty-ltd.pdf>

### **NT Christian Schools – Delivered on 4 August 2017**

On the 6 August 2015 a student was run over and killed by a four-wheel drive that he and fellow students were pulling at the Gawa School sports carnival on Elcho Island.

On the 4 August 2017 the defendant was convicted and fined \$50,000 for a breach of section 32 of the Act. A mandatory \$1500 victims levy was also imposed in relation to the finding of guilt.

In the matter of *Work Health Authority v Northern Territory Christian Schools*, the sentencing remarks of Her Honour Judge Morris in the Local Court at Darwin are available online:

<http://www.worksafe.nt.gov.au/Documents/nt-christian-schools.doc>

### **Top Developments (NT) Pty Ltd – Delivered on 12 May 2017**

In February 2016 two separate complaints were received about a worker climbing a tower crane at a height of approximately 18 to 21 meters without appropriate fall protection.

On the 12 May 2017 the defendant was convicted and fined \$11,800 for a breach of section 32 of the Act. The defendant was also ordered to pay a victim levy and costs totalling \$3,500.

In the matter of *Work Health Authority v Top Developments (NT) Pty Ltd*, the sentencing remarks of Her Honour Judge Fong Lim in the Local Court at Darwin are available online:

<http://www.worksafe.nt.gov.au/Documents/top-developments.doc>

### **Ben's Tree Service Pty Ltd – Delivered on 20 July 2016**

On the 24 March 2015 a worker was seriously injured whilst shredding trees and palm fronds in preparation for an approaching cyclone.

On the 20 July 2016 the defendant was convicted and fined \$15,000 for a breach of section 32 of the Act.

In the matter of *Police v Ben's Tree Service Pty Ltd*, the sentencing remarks of His Honour Judge Cavenagh in the Local Court at Darwin are available online:

<http://www.worksafe.nt.gov.au/Documents/bens-tree-service.doc>

### **The Rock Tour Pty Ltd – Delivered on 23 June 2016**

On the 15 June 2014 a tourist was fatally injured when climbing down onto an overhanging ledge below Kestrel Falls look out.

On the 23 June 2016 the defendant was convicted and fined \$140,000 for a breach of section 32 of the Act.

In the matter of *Stephen Hugh Gelding v The Rock Tour Pty Ltd*, the sentencing remarks His Honour Judge Bamber in the Local Court at Alice Springs are available online:

<http://www.worksafe.nt.gov.au/Documents/the-rock-tour.doc>

#### **Perkins Welding & Fabrication Pty Ltd – Delivered on 15 July 2015**

On the 10 April 2012 a worker sustained a workplace injury and was admitted as an inpatient at the Royal Darwin Hospital. Enquiries proved that the company never held an insurance policy or indemnity from an approved insurer, nor did they notify NT WorkSafe of the incident.

On the 15 July 2012 the defendant was convicted and fined \$58,625 for a breach of section 126 of the Workers Rehabilitation and Compensation Act and \$16,400 for a breach of section 38 of the Act.

In the matter of *Police v Perkins Welding & Fabrication Pty Ltd*, the sentencing remarks His Honour Stipendiary Magistrate Neill in the Work Health Court in Darwin are available online:

<http://www.worksafe.nt.gov.au/Documents/perkins-welding-and-fabrication.doc>

#### **Arafura Plumbing Pty Ltd – Delivered on 9 October 2013**

On the 18 June 2012 Arafura Plumbing Pty Ltd were found to be in breach of a notice prohibiting the transport and storage of flammable gas in enclosed vehicles.

On 9 October 2013 the defendant was convicted and fined \$5,080 for a breach of sections 19 and 197 of the Act.

In the matter of *Police v Arafura Plumbing Pty Ltd*, the sentencing remarks of His Honour Stipendiary Magistrate Maley in the Work Health Court at Darwin are available online:

<http://www.worksafe.nt.gov.au/Documents/arafura-plumbing.doc>

#### **Matters to consider regarding prosecutions**

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| <ol style="list-style-type: none"><li>21. Is the current approach by NT WorkSafe prosecutions appropriate and effective?</li><li>22. Are prosecutorial decisions made on a timely and efficient basis and based on sound principles?</li><li>23. Is procedure and sentencing by the courts consistent?</li><li>24. What other arrangements should be implemented to ensure that prosecution decisions and cases are managed in an efficient manner and in line with the public interest?</li></ol> |
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#### **2.6 Enforceable undertakings**

Enforceable undertakings are voluntary agreements where a person agrees to take certain specified actions to rectify an alleged breach of the work health and safety laws or improve their work health and safety performance. In 2016-17, the Work Health Authority accepted two enforceable undertakings in relation to an incident in which a worker sustained serious injuries after falling from a height of approximately five metres at a construction site in Darwin.

A person can propose an enforceable undertaking as an alternative to prosecution for a contravention of alleged contravention of the Act, except in relation to a category one offence. An enforceable undertaking is seen as mutually beneficial in that:

- the person or company protects their reputation by not gaining a recorded conviction;
- tangible improvements are made to work health and safety as a result of the undertaking;
- the person or company agrees to cease and never again allow the behaviour that led to the contravention to occur; and



- a positive benefit to the community is made.

According to Parker's research<sup>10</sup>, in the context of trade practices, enforceable undertakings provide regulators with:

*more innovative, expansive and preventive remedies than are available through court orders. They can both attract management attention, and then can capitalise on that by requiring the company to appoint appropriate staff and implement a compliance program to meet particular standards and by requiring ongoing attention to audits and reports. This will, however, only be done if enforceable undertakings require independent review or audit of compliance with the undertakings.*

Other arguments supporting the use of enforceable undertakings include that:

- enforceable undertakings are consistent with a graduated approach to enforcement;
- they provide a speedier and more predictable response to non-compliance than court proceedings;
- by involving the alleged offender in developing the conditions of the enforceable undertaking, ongoing commitment to sustainable improvements is more likely and by allowing affected persons to express views, the principles of restorative justice will (to that extent) be applied; and
- depending on the nature of the undertaking it can provide significant benefits, not only to the immediate workplace and workers, but to the industry as a whole.

Issues that get raised from time to time by stakeholders, include:

- broadening the range of contraventions in relation to which an enforceable undertakings may be accepted;
- not allowing applications for enforceable undertakings to be accepted where the incident involved a fatality;
- clarifying roles of those involved in the enforceable undertaking process and ensuring the process does not build expectations that an enforceable undertaking will be accepted; and
- promoting the use of enforceable undertakings as an alternative to prosecution.

### **ACSM Builders – Accepted on 11 May 2018**

On 24 August 2016, a worker employed by a subcontractor, fell from the first floor of a residential home under construction. He was cleaning tile grout and stepped into an unguarded void. He fell approximately 2.9 metres resulting in a break of the left femur.

It was alleged that ACSM Builders Pty Ltd and its Director, Mr Sakellarios Athanasiou failed to comply with their health and safety duties under section 32 of the Act.

An undertaking given by ACSM Builders in relation to the alleged contraventions has been accepted by the Regulator as an enforceable undertaking under Part 11 of the Act.

ACSM Builders has committed to a range of activities to improve health and safety in the workplace and deliver health and safety initiatives to the wider community. These activities include:

- Employ a dedicated Safety Officer in the workplace to develop, implement and continually improve appropriate systems of work. This includes monitoring all ACSM Builders workers and subcontractors on site.

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<sup>10</sup> Parker C. (2003) 'Arm Twisting, Auditing and Accountability: What Regulators and Compliance Professionals should know about the Use of Enforceable Undertakings', presentation to the Australian Compliance Institute, Melbourne, 28<sup>th</sup> May.

- Develop the skill set of ACSM Builders workers by providing accredited training relevant to the construction industry.
- Improve the company's toolbox meetings.
- Purchase two scissor lifts and provide relevant training to reduce the risk of working at heights to ACSM Builders workers.
- Purchase a temporary power site board to reduce the risk of electric shocks.
- Fund the training in Certificate IV in OH&S for at least one worker to support the Safety Officer.
- Organise an accredited working at heights course for subcontractors regularly used by ACSM Builders.
- Present a 'lessons learnt' to apprentices in the NT construction industry, including details of the incident and the importance of following safety procedures.
- Organise working at heights or basic scaffolding courses for NT construction industry apprentices to supplement their training.
- Sponsor or assist in promoting the importance of fall protection in the construction industry during Safe Work Month 2018 or 2019.
- Donate \$10,000 to CareFlight.
- Mentor and provide information to local people and subcontractors on working at height techniques and fall protection when working in remote communities.

The amount spent on work health and safety activities to date is \$12,800 (not included below).

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace - \$176,500
- industry - \$23,000, and
- the community - \$10,000.

The financial commitments to the undertaking have a total minimum expenditure of \$209,500.

### **Downer EDI Mining – Accepted on 9 February 2018**

On 22 March 2015 two workers loss consciousness after allegedly being exposed to a toxic environment.

It was alleged that Downer EDI Mining Pty Ltd failed to comply with health and safety duties under sections 32 and 39 of the Act.

An undertaking given by Downer EDI Mining Pty Ltd in relation to the alleged contraventions has been accepted by the Regulator as an enforceable undertaking under Part 11 of the Act.

Downer EDI Mining Pty Ltd has committed to a range of activities to improve health and safety in the workplace and deliver health and safety initiatives to the wider community. These activities include:

- Develop and implement a Digital Pre-Task Assessment Training Package (workplace inspections, ventilation and hazard rectification).
- Develop and implement an electronic storyboard health campaign on healthy lifestyle, healthy heart, prostate cancer, mental health and make available to NT industry through distribution at industry forums.
- Develop and implement a digital personal safety message campaign focussed on hazard awareness and hazard rectification including ventilation and heat stress management, and make available to NT industry through distribution at industry forums.
- Present the findings of the incident and activities committed to under the enforceable undertaking to NT industry forums including, Mining the Territory Conference, Katherine Regional Mining and Exploration Forum and NT Safe Work Month.

- Jumbo guard presentation to industry forums and/or sites.
- Sponsor the Mining the Territory Conference and provide information on the digital health campaigns and digital safety messages.
- Sponsor the Katherine Regional Mining and Exploration Forum.
- Donation to Careflight NT.
- Pay for four mental health first aid courses for community groups and members of the public.

The amount spent on work health and safety activities to date is \$20,000.

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace - \$60,000
- industry - \$40,000, and
- the community - \$36,000.

The financial commitments to the undertaking have a total minimum expenditure of \$136,000.

#### **Tomazos Group Pty Ltd – Accepted on 5 April 2017**

On 21 April 2015 a worker sustained serious injuries after falling from a height of approximately five metres at a Tomazos Group Pty Ltd construction site in Darwin.

It was alleged that Tomazos Group Pty Ltd failed to comply with health and safety duties under sections 32, 38 and 39 of the Act and regulations 39 and 300 of the Regulations.

An undertaking given by Tomazos Group Pty Ltd in relation to the alleged contraventions has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act. Tomazos Group Pty Ltd has committed to a range of activities to improve health and safety in the workplace and deliver health and safety initiatives to the wider community. These activities include:

- Providing Certificate IV in work health and safety training to workers and subcontractors.
- Creating an additional position to help oversee work health and safety.
- Providing additional training to workers and management to reinforce the right to stop unsafe work; and
- Providing donations to Men’s Shed and Oz Help.

The amount spent on work health and safety activities to date is \$10,000.

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace – \$30,000;
- industry - \$10,000, and
- the community - \$10,000.

The financial commitments to the undertaking have a total minimum expenditure of \$60,000.

#### **JGA Concreting Pty Ltd – 5 April 2017**

On 21 April 2015 a worker employed by JGA Concreting Pty Ltd sustained serious injuries after falling from a height of approximately five metres at a construction site in Darwin.

It was alleged that JGA Concreting Pty Ltd failed to comply with health and safety duties under section 32 of the Act.

An undertaking given by JGA Concreting Pty Ltd in relation to the alleged contraventions has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act. JGA Concreting Pty Ltd has committed to a range of activities to improve health and safety in the workplace and deliver health and safety initiatives to the wider community. These activities include:

- Providing training to workers in work health and safety, dogging and rigging, working at height and forklift training.
- Translating Safe Work Method Statements (SWMS) and internal policy documents into Greek.
- Publishing translated SWMS on the JGA Concreting website for general industry use.
- Providing donations to the Charles Darwin University English Language Program, the Essington School, children's charities and sporting organisations.

The amount spent on work health and safety activities to date is \$9,000.

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace - \$10,420
- industry - \$14,000, and
- the community - \$20,000.

The financial commitments to the undertaking have a total minimum expenditure of \$53,420.

#### **The Trustee for the Northline Unit Trust – Accepted on 6 April 2016**

On 17 April 2014, a customer of The Trustee for the Northline Unit Trust (Northline) was severely injured by falling freight during the unloading of a truck at the Gunbalanya service station.

It was alleged that Northline failed to comply with health and safety duties under section 32 of the Act.

An undertaking given by Northline in relation to the alleged contravention has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act. Northline has committed to a range of activities to improve health and safety standards in their workplace and deliver health and safety initiatives to the heavy vehicle transport industry and the wider West Arnhem community. These activities include:

- Engagement of an independent WHS consultant to conduct a major review and upgrade of safety management systems for the Darwin depot and surrounding remote delivery locations as a pilot case. This will be rolled out nationally following Northern Territory implementation.
- Undertaking an external audit of Northline's Darwin safety management system to verify compliance with AS/NZS4801.2001.
- Introduction of new learning and development programs for staff.
- Implementation of a formal external program to verify competency of forklift and heavy vehicle drivers.
- Investigation and communication of best practice options for braking systems, external vehicle cameras and side under run protection to the industry to educate operators about advancements in heavy vehicle safety systems.
- Development and delivery of a Remote Community Heavy Vehicle Awareness Campaign, designed to improve community awareness and safety understanding of heavy vehicles and loading zones used by operators.

The amount spent on work health and safety activities to date is \$8,400.

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace - \$120,400 for NT activities, with additional costs for national implementation
- industry - \$25,780
- the community - \$15,000.

The financial commitments to the undertaking have a total minimum expenditure of over \$160,000.

#### **Kalidonis Pty Ltd – Accepted on 4 March 2016**

On 15 March 2014, workers engaged by Kalidonis Pty Ltd to renovate the office at 16 McMinn Street, Darwin were potentially exposed to asbestos.

It was alleged that Kalidonis Pty Ltd failed to comply with health and safety duties under section 32 of the Act.

An undertaking given by Kalidonis Pty Ltd in relation to the alleged contravention has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act. Kalidonis Pty Ltd has committed to a range of activities to improve health and safety standards in the workplace and deliver health and safety initiatives to the industry and wider community. These activities include the:

- Engagement of an independent WHS consultant to audit safety systems.
- Ongoing proactive consultation with workers and others to discuss WHS obligations in the construction industry.
- Development of safety systems working towards WHS compliance in accordance with AS 4801.
- Translation of safety systems into Greek to be distributed for use within the construction industry.
- Donation of concreting works and awning to the Darwin Surf Life Saving Club to provide a safe environment with shade cover.

The amount spent on work health and safety activities to date is \$16,000.

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace - an estimated ongoing cost of \$12,000 to \$24,000
- industry - \$5,000, and
- the community - \$44,000.

The financial commitments to the undertaking have a total minimum expenditure of \$77,000.

#### **Alcan Gove Pty Ltd – Accepted on 18 December 2015**

On 25 February 2014, an Alcan Gove Pty Ltd worker suffered fatal injuries while attending to a maintenance issue at the Lime Calcination Plant in Nhulunbuy, Northern Territory. The incident occurred while the worker was investigating a faulty reverse closing trap. The worker, who was working by himself at the time, was crushed between the counterweight and service hopper chute.

It was alleged that Alcan Gove Pty Ltd failed to comply with health and safety duties under Section 32 of the Act.

An undertaking given by Alcan Gove Pty Ltd in relation to the alleged contravention has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act. Alcan Gove Pty Ltd has committed to a range of activities to improve health and safety standards in the workplace and deliver health and safety initiatives to the industry and wider community. These activities include the:

- Introduction of a mandatory 'Human Performance' safety program focused on identifying and assessing the human behaviours that impact safety performance in a workplace and equipping workers and leaders with the tools they need to manage those factors.
- Production of a training video based on the incident, to be used to communicate the lessons learnt and the importance of isolation in industrial environments.
- Provision of internal resources to develop and conduct mining safety courses at the proposed Gumatj Mining Centre.
- Delivery of presentations regarding the incident at relevant industry forums.
- Provision of funding to community groups to promote or undertake activities related to marine safety.
- Provision of funding for a subsidised St John's First Aid course for Nhulunbuy residents.
- Provision of funding to subsidise the cost of specialist health and safety systems advice and support for local businesses.
- Regulator's costs.

The amount spent on rectifications and activities to date is \$806,908 (approximately).

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace - \$644,560
- industry - \$83,000, and
- the community - \$218,400.

The financial commitments to the undertaking have a total minimum expenditure of over \$945,000.

#### **Matters to consider regarding enforceable undertakings**

25. How can the application process be amended to ensure that the process does not build expectations that applications will be accepted?
26. Should the enforceable undertaking guidelines exclude consideration of an application involving a fatality, unless particular circumstances exist?
27. Alternatively, should enforceable undertakings be promoted for matters involving an alleged contravention by an officer or a worker (other than Category 1 offences), to take advantage of opportunities to encourage and enable behavioural change and capability?

### **TOR 3. Determine whether NT WorkSafe has the appropriate balance of regulation of safety (including prosecutions and enforcements) and education and awareness across the Northern Territory.**

Compliance is best achieved through informed and cooperative measures. Consequently awareness and education activities, the provision of information and guidance about what compliance looks like, and how to build a mature safety culture, should be a core element of the regulatory model. NT WorkSafe has been active in providing information and advice sessions.

Description of Activity	2012/13	2013/14	2014/15	2015/16	2016/17	Total
Information / Advice Sessions	103	51	157	271	240	822

**Table 5 – Inspectorate Activity**

### 3.1 NT WorkSafe's engagement with industry to help them understand what compliance looks like and how to build a mature safety culture

Ensuring employers and workers understand what compliance looks like and how to build a mature safety culture is a core element of NT WorkSafe's enforcement and compliance approach. In particular, providing workplaces with information that is practical, relevant, and easy to use for their specific industry is crucial in enabling businesses to implement their own safety strategies. This is especially so with regard to small to medium sized businesses.

Additionally, the promotion of knowledge about how to build effective safety leadership and culture within organisations enables workplaces to sustainably drive safety improvements.

To improve proactive engagement with industry, NT WorkSafe has increased its contribution at industry conferences and events through sponsorship and participation as an exhibitor. Information relevant to attendees is on hand at the NT WorkSafe booth, which is manned by NT WorkSafe Inspectors and Advisory staff.

In 2016-17, NT WorkSafe participated in the following events:

- NT Resources Week – 16 to 17 August 2016;
- Safety Institute of Australia (OHS in Challenging Environments) –6 to 7 September 2016;
- NT Cattlemen's Association Annual Conference – 30 to 31 March 2017; and
- AFL Northern Territory Ltd – Big Rivers Football League sponsorship from January 2016 to January 2019.

In 2015-16, NT WorkSafe participated in the following industry events:

- NT Resources Week – 25 to 27 August 2015;
- SIA WHS Conference – 7 to 8 October 2015;
- NT Cattlemen's Association Annual Conference – 17 March 2016;
- Katherine Regional Mining and Exploration Forum – 24 and 25 May 2016; and
- AFL Northern Territory Ltd – Big Rivers Football League sponsorship from 8 January 2016 to 8 January 2019.

In 2014-15, NT WorkSafe participated in the following industry events:

- NT Resources Week - 20 August 2014;
- SIA WHS Conference - 30 October 2014;
- Alice Springs Mining Services Expo - 17 March 2015;
- NT Cattlemen's Association Industry Conference - 26 March 2015;
- Katherine Regional Mining Expo - 26 May 2015;
- Darwin Plumbing Trade Expo - 27 May 2015; and
- Australian Hotels Association Expo - 3 June 2015.

In 2013-14, NT WorkSafe participated in the following industry events:

- NT Resources Week – September 2013;
- Alice Springs Mining Services Expo – March 2014;
- Safety in Action Darwin – March 2014;
- Northern Territory Cattlemen's Association AGM and Industry Conference – March 2014;
- 2014 AHA (NT) Oamps Trade Show – May 2014; and
- Katherine Regional Mining and Exploration Forum – May 2014.

### 3.2 Small Business Safety Program

Since early 2016, the PAS unit has incorporated a Small Business Safety Program (**SBSP**). The program is confidential, free of charge and allows business owners to consult with Small Business Safety Advisors (the **Advisors**). The Advisors are not authorised officers and therefore have no delegated powers under the Act.

The SBSP is available to small businesses across the Territory. Advisors travel to regional and remote areas to assist, educate and empower small businesses to manage their own work health and safety processes.

In 2016-2017 a total of 114 businesses accessed the SBSP. These businesses cover a wide range of industry sectors including: building and construction, tourism and hospitality, agriculture, retail, manufacturing, and personal services.

### 3.3 Young Worker Program

In 2016 the Operations unit identified that young workers (aged between 16 and 24 years of age) are a high risk work group, entering the workforce with limited skills and experience. Workers' compensation statistics show that approximately 300 young workers in the Northern Territory are injured in the workplace each year.

In response, the Operations unit developed and implemented the Young Worker Program. The program is designed to educate young workers and their employers about various work health and safety topics including:

- rights and responsibilities of employers and workers;
- duty of care;
- incident notification;
- workplace consultation;
- hazard identification; and
- risk management

Through the program, the Operations unit engages with young workers and their employers by delivering information sessions, workshops, toolbox talks, team meetings and management presentations. In 2016-2017 the program delivered 26 sessions to young workers and their employers.

A dedicated page has been published on the NT WorkSafe website to support the program. That page provides additional information and resources relevant to young workers. It can be found at: <http://www.worksafe.nt.gov.au/SafetyAndPreventions/Pages/Young-Worker-Program-.aspx>

### 3.4 Remote Community Work Health and Safety Initiative

In 2016 the Operations unit designed, developed and implemented the Remote Community Work Health and Safety Initiative in partnership with North East Arnhem Land Aboriginal community stakeholders. Twenty-one businesses and three Aboriginal Corporations were involved in development of the program which aimed to improve the safety culture in workplaces and encourage participants to apply the same safety focus at home.

The program provides advice, education and training to workers and employers and has been delivered to 86 students at six schools; 164 workers at 21 businesses and Miwatji Employment and Participation groups across 11 communities.



The program aimed to ensure that remote Aboriginal workers were given accessible, culturally appropriate work health and safety training to improve the safety culture throughout the East Arnhem community.

NT WorkSafe developed three culturally appropriate short films for the region as well as other guidance and educational materials. Films were produced locally, starred local workers and residents and were aired in-country and published online through the Safe Work Australia virtual seminar series website. The films are:

- *NT WorkSafe WHS Consultation in North-East Arnhem Land* – developed to promote the Remote Community Work Health and Safety Initiative;<sup>11</sup>
- *Djaka Madagarritj'ku (Keep Safe From Danger)* – developed to highlight the importance of identifying hazards and risks encountered in daily life as well as the workplace;<sup>12</sup> and
- *Wänayi Runiyi (Come Home Safely)* – developed as a local version of the successful Victorian “homecomings” work health and safety film. The film explores the potential impacts of poor safety practices on family.<sup>13</sup>

Following interest in the program from stakeholders on Groote Eylandt, the Tiwi Islands, the Victoria Daly, Roper Gulf and Central Desert regions the Operations unit will plan for further expansion of the program.

**Matters to consider regarding NT WorkSafe’s effectiveness in relation to providing compliance information and promoting work health and safety awareness**

28. How effective are NT WorkSafe’s awareness and engagement activities in getting the health and safety message to be heard and understood widely?
29. How effective are NT WorkSafe’s awareness and engagement activities in driving duty holders to comply with legislation?
30. Are there demographic, geographic or industry areas where additional measure may be required and if so, what are they?
31. In your experience, have attitudes or behaviours been influenced by an awareness and engagement activity run by NT WorkSafe?
32. Are there any ways that NT WorkSafe’s approach to awareness and engagement activities could be improved to assist with ensuring compliance with the work health and safety laws?
33. How effective are the tools, resources and programs provided by NT WorkSafe in assisting industry and workers to improve safety outcomes?
34. Are there any other tools or resources that you think should be developed to encourage and assist industry to comply with the work health and safety laws?

<sup>11</sup> Available online at: <https://www.safeworkaustralia.gov.au/improving-indigenous-work-safety>

<sup>12</sup> Available online at: <https://www.safeworkaustralia.gov.au/media/djaka-madagarritjku-keep-safe-danger>

<sup>13</sup> This film was produced in 2016-2017 for broadcast and online publication in 2017-2018.

TOR 4. Identify any organisational, management, systems or cultural issues that may affect the organisation's ability to operate in a best practice model for safety regulators.

TOR 5. Identify any capability gaps that may exist with current structural and staffing arrangements.

TOR 8. Examine any further measures that can be taken to discourage unsafe work practices, taking into account the national review.

TOR 9. Provide an opinion on improvements required in the organisation to achieve best practice for a safety regulator both now and into the future, ensuring those suggestions can be funded from and within current resources.

Although Terms of Reference 4, 5, 8, and 9 are separate, they contain many similar elements. For the purposes of this discussion paper, these Terms of Reference are conveniently addressed together.

The issue of culture is expressed in Term of Reference 4, but underpins each of these Terms of Reference. In any organisation, some cultural issues may be positive and others negative. Those that are positive should be identified and encouraged, whilst those that inhibit an organisation's ability to operate optimally must be discouraged.

#### 4.1 Executive

The Executive unit of NT WorkSafe comprises four areas which function under the direction of the Work Health Authority to support the effective administration of legislation including the *Act*, the *Return to Work Act* and the *Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act*.

The Regulatory Reform area is responsible for participating in local and national reviews of relevant legislation, representing the Northern Territory on various national committees and groups, coordinating legislative amendments, and undertaking public consultation as required. The unit consults and develops policy specific to NT WorkSafe's regulatory functions.

The Communications area is responsible for developing and publishing various information products, coordinating NT WorkSafe involvement in local and national safety events, and developing and implementing communication strategies.

The Business Administration area is responsible for providing support services within NT WorkSafe including ministerial liaison, committee and council arrangements, delegations, finance assistance, corporate governance, travel arrangements, building maintenance and vehicle management.

The Training area is responsible for developing a comprehensive training management system for NT WorkSafe in consultation with all business units. The training area supports the other business units by helping them to identify and prioritise training needs for inclusion in the annual NT WorkSafe training plan.

## 4.2 Operations

The Operations unit comprises the Inspectorate and is the public face of NT WorkSafe. The Operations unit provides safety education and advice to workers and employers throughout the Northern Territory to help them to understand and meet their work health and safety obligations. The Operations unit investigates notifiable incidents, and monitors and enforces compliance with the Act and Regulations in line with the National Compliance and Enforcement Policy.

There are three work teams in the Operations unit:

- **Electrical Safety Team** – assists the Electricity Safety Regulator to monitor and regulate electrical safety and technical standards from the point of network connection at the premises to the outlet, as well as providing advice and assistance to licenced electrical workers, individual home owners, occupiers and persons conducting a business or undertaking.
- **Remote Safety Team** – monitors and regulates work health and safety and provides advice and education to workers and businesses located in remote and regional areas of the Northern Territory.
- **General Safety Team** – monitors and regulates work health and safety and provides advice and education to workers and businesses located in urban areas of the Northern Territory.

The Operations unit develops and implements targeted campaigns to identified high risk sectors to increase awareness of workplace health and safety, and support Northern Territory industry to achieve and exceed national safety standards and targets.

Section 160 of the Act outlines the functions and powers of inspectors as follows:

- (a) *to provide information and advice about compliance with this Act;*
- (b) *to assist in the resolution of:*
  - (i) *work health and safety issues at workplaces; and*
  - (ii) *issues related to access to a workplace by an assistant to a health and safety representative;*  
*and*
  - (iii) *issues related to the exercise or purported exercise of a right of entry under Part 7;*
- (c) *to review disputed provisional improvement notices;*
- (d) *to require compliance with this Act through the issuing of notices;*
- (e) *to investigate contraventions of this Act and assist in the prosecution of offences;*
- (f) *if permitted under section 40(3) of the Coroners Act, to attend coronial inquests in relation to work-related deaths and examine witnesses;*
- (g) *to monitor compliance with this Act.*

## 4.3 Permissioning and Advisory Services

The Permissioning and Advisory Services (**PAS**) unit of NT WorkSafe performs various functions in the administration of the *Act*, the *Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act*, the *Dangerous Goods Act*, and all associated Regulations. PAS functions include:

- providing specialist advice and support to businesses and individuals;
- issuing licences, permits and registrations;
- approving course delivery by training providers; and

- issuing high risk work licence assessor accreditations.

The PAS unit accepts and triages notifiable incidents and complaints as well as mandatory notifications including notification of demolition, asbestos removal, pipelines, lead work and Schedule 11 hazardous chemicals. The PAS unit provides businesses with practical tools to help them to identify hazards, helps businesses and workers to identify relevant and functional solutions, and offers ongoing support and advice on work health and safety matters.

Throughout 2016-17, the PAS unit received 15, 158 telephone enquiries regarding work health and safety and responded to 8, 273 general enquiries through its generic email address.

#### 4.4 Rehabilitation and Compensation

The Rehabilitation and Compensation unit of NT WorkSafe performs various functions in the course of administering the *Return to Work Act* including:

- providing advice and information to employers, workers, insurers and the public about workers' compensation matters;
- coordinating mediations (between claimants, employers and insurers) in accordance with legislation;
- arranging permanent impairment reassessments in accordance with legislation;
- approving insurers and self-insurers in the Northern Territory;
- approving rehabilitation providers; and
- collecting statistical information from insurers and self-insurers for work health safety activity and for national reporting to Safe Work Australia.

The Northern Territory Scheme is referred to as a privately underwritten scheme because private insurers carry the financial risk of pricing and claims. Privately underwritten schemes operate in Western Australia, Tasmania and the Australian Capital Territory while public schemes (where the financial risk falls to the government) operate in other jurisdictions.

The Northern Territory Government is a self-insurer under the *Return to Work Act* and carries the financial risk for its own workers. The *Return to Work Act* does not regulate the insurance premiums charged by insurers.

Four insurers have been approved under the *Return to Work Act*. These are:

- Allianz Australia Insurance Limited;
- QBE Australia;
- CGU (Insurance Australia Limited); and
- GIO (AAI Limited).

The *Return to Work Act* also establishes a Nominal Insurer for instances where an employer fails to insure or in cases where the insurer defaults. The Nominal Insurer meets claims liabilities by obtaining contributions from the approved insurance companies based on their market share.

The *Return to Work Act* also establishes a Scheme Monitoring Committee, whose role is to monitor the viability and performance of the Northern Territory workers' compensation scheme. The scheme is the subject of an annual actuarial report which is published on the NT WorkSafe website. Key trends from the 2015-16 report on the performance of the scheme were:

- Number of claims incurred remained relatively stable at between 2,600 and 2,800 claims per year (not including self-insurers).

- A reducing claim frequency (number of claims divided by estimated number of full time employees) was noted. This is attributed to a significant increase in wages without a corresponding increase in claim numbers.
- The average claim size for 2016 was \$42,500, which is lower than the 2015 average of \$44,400 but higher than most prior years.
- Incurred costs for 2016 is \$109.7 million, this is lower than 2015 however is in line with prior years.
- Settlements, non-economic lump sums and weekly benefits combined account for two thirds of the total incurred cost and payments each financial year.
- Distribution of payments for the last seven accident years has remained fairly stable.

The *Return to Work Act* establishes the Workers Rehabilitation and Compensation Advisory Council to keep the operation of the workers compensation scheme under review. The Council has prepared an Annual Report outlining its activities during 2016-17 as required under the *Return to Work Act*.

35. Are there capability gaps in NT WorkSafe and if so how might they be addressed?
36. What positive, or negative, cultural issues exist within NT WorkSafe? How can any positive cultural issues be encouraged, or negative issues discouraged?

## TOR 6. Identify any legislative gaps that may exist and proposed remedies.

The Regulations were amended to rectify some issues with technical definitions and incorrect language as well as to reduce and clarify the impact of the Globally Harmonised System of Classification and Labelling of Chemicals (**GHS**) on the manufacturers, importers, retailers and users of agricultural and veterinary chemicals.

The amendments were the culmination of considerable national debate around the application of the GHS to agricultural and veterinary chemicals. The amendments to the WHS Regulations relating to the GHS ease negative impacts to businesses and end users without reducing safety outcomes by:

- excluding Schedule 8 veterinary medicines from GHS labelling requirements;
- excluding Schedule 4 veterinary medicines from GHS labelling requirements providing they are supplied in a form and packaging consistent with direct administration to animals;
- clarifying that it is not necessary to include duplicate label elements required by other labelling laws, and that it is permissible to omit elements provided this does not decrease the level of protection or information in relation to the hazards of the chemical; and
- allowing businesses and end users to continue to use, store and handle hazardous chemicals labelled under the pre-GHS system if the chemicals were supplied to the workplace prior to 1 July 2017.

37. Are there legislative gaps not dealt with elsewhere in this paper that require action, and if so how should they be addressed?

## TOR 7. Consider specific issues such as whether an offence of ‘gross negligence causing death’ should be introduced and whether current penalty levels under the current work health and safety laws act as a sufficient deterrent to non-compliance.

In announcing the Best Practice Review, the government is committed to examining whether any further measures could be undertaken to discourage unsafe work practices. This includes consideration of:

- the merit of introducing a new offence of gross negligence causing death: and
- whether existing penalties for work-related deaths and serious injuries should be increased.

### Issues to consider regarding further measures that can be taken to discourage unsafe work practices

38. Is there merit in introducing an offence of gross negligence and increasing penalties?
39. If such an offence is to be introduced, what should be the elements of the offence, in what Act should it be included, what if any defences should be available, should it apply to a body corporate as well as individuals, what should the legal standard of negligence be and what penalties would apply?
40. In addition to the above, are there any further measures that should be considered as part of the review that may discourage unsafe work practices?

### 7.1 Existing penalties for work-related fatalities and injuries

The national model Work Health and Safety legislation, as implemented on 1 January 2012, significantly changed the structure of offences and the penalty amounts.

Under the Act penalties are based on the behaviour/issue rather than the outcome. The penalties are to:

- be proportionate and relevant to the seriousness of the conduct and reflect the consequences that may result from failure to remedy serious risks to health or safety i.e. risk to personal safety and potential loss of life arising from any breaches;
- reflect the recommendations from the national review of WHS legislation to strengthen the deterrent effect of the penalties;
- extend the ability of the courts to impose more meaningful penalties, where appropriate; and
- emphasise to the community the seriousness of the offences under the WHS legislation.

The maximum penalties set in the Act reflect the level of seriousness of the offences and have been set at levels high enough to cover the worst examples of offences involving reckless conduct. Penalties and the possibility of imprisonment in the most serious cases are a key part of achieving and maintaining a credible level of deterrence to complement other types of enforcement action.

New South Wales, South Australia, Australian Capital Territory, Queensland and Tasmania have all adopted the model laws and have the same basic offences and penalties as the Northern Territory.

Victoria and Western Australia have not adopted the model laws and their offences and penalties differ from those in the Northern Territory and the other harmonised states.

A significant increase in maximum fines under legislation does not mean courts will automatically increase the level of fines they impose. The increase in legislated penalties takes time to be reflected in the penalties imposed by the courts. Courts are more likely to impose fines around the same level as they have for previous matters with only incremental increases. This has not been such an issue in other jurisdictions as they had substantially higher penalties prior to model WHS laws. For example NSW had a

maximum penalty for reckless conduct causing death of \$1,650,000 for a corporation under their repealed legislation and South Australia had a maximum fine for risk of death or serious harm of \$1,200,000 for a corporation.

## 7.2 National Review

The Australian National Review into Model Occupation Health and Safety Laws (2008/2009) emphasised that contraventions of the WHS statutes, particularly the general duty provisions, were and should be 'criminal'. The Review noted "Providing for a breach of a duty of care to be a criminal offence is an essential element of modern OHS legislation.... Making non-compliance with a duty of care a criminal offence not only reflects the seriousness with which such conduct is regarded, but also reinforces the provision's deterrent effect."

In responding to the proposal under the National Review into Model OHS Laws (2009) that a Category 1 offence have the elements that the duty holder was reckless or grossly negligent, the Workplace Relations Ministerial Council (**WRMC**) considered that 'gross negligence' offences should be dealt with outside the model Act as they would otherwise cut across local criminal laws and manslaughter offences. Accordingly, the WRMC modified the wording of the Category 1 offence to cover the most serious breaches, for an offence of recklessly endangering a person to risk of death or serious injury at a workplace, thus removing 'gross negligence' from the categories of offences.

### **Occupational health and safety legislation – categories of offences**

A person who is allegedly responsible for a work related death could be prosecuted under one of the three categories of offences for breaching a health and safety duty under occupational health and safety legislation.<sup>14</sup> These offences focus on the failure to meet the safety duty, rather than the actual occurrence of a work-related fatality or injury. Category 1 is a crime under the Criminal Code. It has three elements: the existence of a duty; breach of that duty without reasonable excuse exposing a person to a risk of death, serious injury or serious illness; and recklessness by the offender as to the risk of harm. The maximum penalty is five years' imprisonment for individuals and monetary penalties of up to \$3 million for corporations, \$600,000 for officers, and \$300,000 for workers and other persons.

Unlike Category 1, Categories 2 and 3 do not have the element of recklessness and there is no provision for reliance on a 'reasonable excuse'. The elements in common are that there is a duty owed and that duty is breached. Category two has an additional element, i.e. the breach exposes a person to a risk of death or serious injury or illness. There have been successful prosecutions for Category 2 offences for work related deaths, both in Queensland and other jurisdictions. Categories 2 and 3 do not attract a penalty of imprisonment, only a sliding scale of monetary penalties according to the status of the offender (corporation, officer, or other individual).

### **Manslaughter – Criminal Code**

A person can be charged with manslaughter and prosecuted under the Criminal Code for a work related death. Under Schedule 1, section 160 of the *Criminal Code Act* (NT) a person is guilty of the offence of manslaughter if:

- (a) the person engages in conduct; and
- (b) that conduct causes the death of another person; and

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<sup>14</sup> ss31 – 33 WHS Act; ss40B – 40D ES Act.

- (c) the person is reckless or negligent as to causing the death of that or any other person by the conduct.

Under Schedule 1, section 161 of the *Criminal Code Act* (NT), a person who is guilty of the offence of manslaughter is liable to imprisonment for life.

### **Recklessness and Gross Negligence**

Work related incidents involving multiple fatalities have caused concern as to whether current penalties are sufficient in instances where actions or omissions allegedly involve gross negligence. This raises the issue of the difference, if any, between the concepts of recklessness and negligence in manslaughter offences.

In criminal law, conduct is reckless if the offender is, or should be aware, of possible consequences of his/her actions, but is indifferent as to whether those consequences occur.<sup>15</sup> In the context of a category 1 offence, a natural person, or corporate entity (acting through their officers) would display recklessness if they were aware, or should have been aware, of a risk of serious harm or death, but their action or inaction showed that they were indifferent as to whether that risk eventuated.

Gross (or criminal) negligence is found where the actions or omissions of the offender, while not intending to cause serious injury or death, fall far short of the standard reasonably expected in the situation, and which involves such a high risk of death or serious harm, that the act merits criminal punishment.<sup>16</sup>

While there is a fine distinction between the two concepts, they are both at the higher end of the scale of risk taking leading to possible death or serious injury.

### **Manslaughter compared with category 1 offences**

The essential difference between a manslaughter (industrial or otherwise) offence under the criminal law and a Category 1 offence is the Act provision arguably has broader coverage. A person commits a Category 1 offence where a Act duty is breached by engaging in reckless conduct exposing a person to risk of death or serious injury. Unlike a manslaughter offence, there is no requirement for death or serious injury to actually occur for a person to be prosecuted for a Category 1 offence. It therefore can be used for a wider range of incidents. It is also a proactive provision and can be used as a tool to address (by prosecution) serious systemic and corporate behaviour failures before a serious injury or death occurs.

### **Possible solutions to address concerns**

Given the serious nature of work related fatalities, including incidents resulting in multiple fatalities, an increase in penalties, or amendment to the current penalty structure in the occupational health and safety legislation could be considered. For example, the *Workplace Health and Safety Act 1995* (Qld) (repealed) provided for a scale of penalties.<sup>17</sup> Where a breach resulted in a single fatality, the maximum penalty was 1000 penalty units or 2 years' imprisonment. However, if a breach resulted in multiple fatalities, the maximum penalty was 2000 penalty units or 3 years' imprisonment. These penalties are both lower than the current year maximum, but the model of imposing penalties according to the number of fatalities might have value.

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<sup>15</sup> *R v Nuri* [1990] VR 641, 643

<sup>16</sup> *Nydam v R* [1977] VR 430, 445; *Burns v The Queen* (2012) 246 CLR 334 French CJ [19]

<sup>17</sup> s24(1) *Workplace Health and Safety Act 1995* (Qld) (repealed).



Another option could be to introduce a discrete offence of industrial or corporate manslaughter into the Criminal Code. This issue has previously been examined by Queensland and a number of other Australian jurisdictions.

This would still be a manslaughter offence but focussed on a particular class of offender, i.e. the corporate entity. However, to prove the necessary degree of negligence, the behaviour of the natural persons, such as company officers, responsible for the management of the entity would still need to be examined by the court.

One of the arguments for the introduction of a specific industrial manslaughter offence is that the current laws are not sufficiently 'criminal' in nature. However, section 31(3) of the Act specifically provides that a Category 1 offence is a crime and imposes a penalty of imprisonment (maximum 5 years).

Australian courts have repeatedly stated that the primary purpose of Act prosecutions is deterrence, both general and specific. Historically, work health and safety prosecutions have been kept separate from the general law partly because of the broader object of promoting and encouraging safe work practices.

#### **Matters to consider regarding catastrophic incidents/multiple fatalities**

41. Is the current Category 1 offence under the Act sufficient to address catastrophic incidents involving multiple fatalities?
42. Alternatively, do penalties need to be increased where an incident involves multiple fatalities?
43. Is there a "gap" between Act Category 1 offences and relevant offences under the Criminal Code that needs addressing?

### 7.3 Recent consideration of industrial manslaughter offences in Australia

#### **Queensland**

Following a detailed review, industrial manslaughter provisions commenced on 23 October 2017 in the *Work Health and Safety Act 2011 (WHS Act)*, *Electrical Safety Act 2002 (ES Act)*, and *Safety in Recreational Water Activities Act 2011 (SRWA Act)*.

These provisions make it an offence for a person conducting a business or undertaking (PCBU), or a senior officer, to negligently cause the death of a worker. In particular, the offence applies if:

- a worker dies, or is injured and later dies, in the course of carrying out work for the business or undertaking (including during a work break); and
- the PCBU's, or senior officer's, conduct cause the death of the worker (i.e. the action or inaction of the PCBU, or senior officer, substantially contributes to the death); and
- the PCBU, or senior officer, is negligent about causing the death of the worker (i.e. the person's action or inaction departs so far from the standard of care required).

Where a PCBU, or senior officer, commits industrial manslaughter, a maximum penalty of 20 years imprisonment for an individual, or \$10 million for a body corporate, applies.

As the industrial manslaughter offence is an indictable offence, the Director of Public Prosecutions is responsible for deciding whether to prosecute these cases. This is consistent with the approach taken for manslaughter prosecutions under the Criminal Code and the prosecution of Category 1 offences under the WHS Act, ES Act and SRWA Act.

All of the defences in Chapter 5 of the Queensland Criminal Code can be used to defend a charge of industrial manslaughter, except for the defence in section 23, which relates to the defence of an individual's act or omission being an 'accident'.

Examples of defences that can be used include ignorance of the law (section 22), mistake of fact (section 24), extraordinary emergencies (section 25) or insanity (section 27).

### **South Australia**

In 2016, the Greens sponsored the Work Health and Safety Act Amendment Bill which proposed the imposition of jail terms of up to 20 years on company officers and individuals who recklessly cause a work-related death (see the inquiry report tabled 1 November 2016). However, a parliamentary committee declined to support the bill. Under a recommendation from the inquiry, SA public prosecutors will establish a protocol for ensuring due consideration is given to launching manslaughter prosecutions after workplace deaths.

### **Australian Capital Territory**

In November 2003, the ACT passed the *Crimes (Industrial Manslaughter) Amendment Act 2002*, which commenced on 1 March 2004. That Act inserted a new Part 2A into the *Crimes Act 1900* (ACT), creating two new offences of industrial manslaughter [note, the term industrial manslaughter is not defined, nor is it used in the substantive provision]. These offences provide that employers (corporations) and senior officers can be prosecuted for the work-related death of workers and carries a maximum penalty of 20 years' imprisonment. To date, there have been no prosecutions under the Crimes Act provisions, however, there has been a successful Category 2 prosecution (for a breach of duty resulting in death) of a corporate entity under the *Work Health and Safety Act 2011* (ACT).<sup>18</sup>

### **Commonwealth**

After the passage of the ACT legislation, the Commonwealth was concerned that some Commonwealth authorities (particularly Government business enterprises, and the employees of such bodies covered by the ACT legislation) could be liable to prosecution for the industrial manslaughter offences contained in Part 2A. Accordingly, the Commonwealth government introduced a Bill to exclude Commonwealth employers and employees from the application of the ACT industrial manslaughter laws and any other similar industrial manslaughter laws enacted by a State or Territory in the future.<sup>19</sup>

The Commonwealth opposed the ACT industrial manslaughter laws on the basis that:

- they created specific offences which duplicated existing offences in other ACT legislation (including OHS legislation) available to deal with workplace deaths; and
- Part 2A singled out the conduct of employers and senior officers.

The Commonwealth considered that creating industrial manslaughter offences under the general criminal law was inconsistent with the overall objective of the WHS legislative framework, i.e. to prevent workplace deaths and injuries, rather than just imposing punishment after the event.

### **Victoria**

In Victoria, the government commissioned Chris Maxwell QC to conduct a review of Victorian OHS laws (the Maxwell Report).<sup>20</sup> That report rejected the introduction of an industrial manslaughter offence. The

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<sup>18</sup> *Brett McKie v Munir Al-Hasani & Kenoss Contractors Pty Ltd (in liq)* [2015] ACTIC 1

<sup>19</sup> Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004.

<sup>20</sup> C Maxwell, Occupational Health and Safety Act Review, March 2004, Government of Victoria; [www.dtf.vic.gov.au/files/d602533b.../OHS-Maxwell-Report-Apr04.pdf](http://www.dtf.vic.gov.au/files/d602533b.../OHS-Maxwell-Report-Apr04.pdf).

Report noted the widely-held view that prosecution of manslaughter should remain within the province of the general criminal law.<sup>21</sup>

### **New South Wales**

In 2000, a panel of legal experts was established to advise the New South Wales government about the *Occupational Health and Safety Act 2000* (NSW). The Panel considered that establishing each of the elements required by the offence in the ACT law provided a very high threshold to secure a conviction. It was believed that the elements in the ACT law were more onerous to satisfy than those which then existed under the NSW legislation. Consequently, it was believed that very few convictions would result, and therefore the deterrent effect of such laws would be lessened.

### **Matters to consider regarding statutory penalties**

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| <p>44. Are the statutory penalties an effective deterrent to poor health and safety practices?</p> <p>45. Are the statutory penalties for reckless conduct proportionate to the seriousness of the offence?</p> |
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<sup>21</sup> Maxwell, pp13-14.

